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CLERK OF SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

JAMES R. KENYON,

Petitioner.

FILED
COURT OF APPEALS
DIVISION II
08 MAR 20 PM 4:07
STATE OF WASHINGTON
BY *[Signature]* DEPUTY

PETITION FOR REVIEW

Court of Appeals No. 35237-1-II
Appeal from the Superior Court for Mason County
The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00042-2

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is JAMES R. KENYON, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the part published opinion in the Court of Appeals, Division II, cause number 34237-1-II, filed February 20, 2008. No Motion for Reconsideration has been filed in the Court of Appeals.

A copy of the part published opinion is attached hereto in the Appendix at A1 through A14.

C. ISSUE PRESENTED FOR REVIEW

Whether a criminal charge must be dismissed with prejudice when it is not brought to trial within the time limits of CrR 3.3 because of the claim that no superior court departments are available to hear the case where the trial court fails to make a reasonable determination concerning the availability of pro tempore judges?

D. STATEMENT OF THE CASE

As alleged in Kenyon's Brief of Appellant filed April 10, 2007, which sets out facts and law relevant to this petition and which is hereby incorporated by reference, Kenyon was convicted of numerous counts of first degree unlawful possession of a firearm. On appeal he

argued, in part, that the trial court had violated his speedy trial rights by continuing his trial without good cause beyond the last allowable start date under CrR 3.3. Division II, while agreeing that dismissal under this rule is required where good cause for a continuance is lacking, found Kenyon's trial was timely under the rationale that "the continuing viability of Mack¹ and similar cases remains an open question." [Slip Op. at 10]. There are reasons to be cautious about this opinion.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

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¹ 89 Wn.2d 788, 576 P.2d 44 (1978).

A CRIMINAL CHARGE MUST BE DISMISSED WITH PREJUDICE WHEN IT IS NOT BROUGHT TO TRIAL WITHIN THE TIME LIMITS OF CrR 3.3 BECAUSE OF THE CLAIM THAT NO SUPERIOR COURT DEPARTMENTS ARE AVAILABLE TO HEAR THE CASE WHERE THE TRIAL COURT FAILS TO MAKE A REASONABLE DETERMINATION CONCERNING THE AVAILABILITY OF PRO TEMPORE JUDGES.

In his Brief of Appellant, Kenyon maintained that the trial court improperly continued his trial beyond the required speedy trial limit based on an assertion that there were no superior court departments available to hear the case. The validity of this claim is the primary concern.

Kenyon's argument is succinct: When a trial is continued beyond the speedy trial limits under the claim that no superior court departments are available to hear the case, as happened here, the trial court is required to make a careful record, which includes a reasoned determination of whether a judge pro tempore could be used. State v. Warren, 96 Wn. App. 306, 310, 979 P.2d 915 (1999). Sans this, dismissal is required. State v. Mack, 89 Wn.2d at 794. No such record was made in this case.

The pretext of the rejection of this argument by the Court of Appeals is the contention that the continuing practicality of Mack is an open question. The subtext, however, is to fashion a new exception to the rule and in the process avoid dismissing the case under Mack because the

trial court failed to look into the availability of pro tempore judges. And while a criminal charge not brought to trial within the limits of CrR 3.3 must be dismissed with prejudice, even if a defendant has not suffered prejudice, State v. Swenson, 150 Wn.2d 181, 187, 75 P.3d 513 (2003), Division II's opinion appears to ignore this because Kenyon was somehow responsible for the problem due to his prior requests for continuances and because the trial was eventually commenced as quickly as possible. [Slip. Op. at 10].

The question before this court is whether Mack is still viable, for it was not satisfied in this case, which requires the dismissal of Kenyon's convictions.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse and dismiss Kenyon's convictions for first degree unlawful possession of a firearm.

DATED this 20th day of March 2008.

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CERTIFICATE

I certify that I mailed a copy of the above petition by depositing it
in the United States Mail, first class postage pre-paid, to the following
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DATED this 20th day of March 2008.

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